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No. 89-———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

HOWARD L. WOLF,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an indictment is sufficient under the Fifth and Sixth Amendments to the United States Constitution where it alleges that the answer "no" to the question "Do you have any reason to believe that [certain parties had contact prior to a particular point in time]" was false, where the indictment does not include a statement of the facts upon which the answer is alleged to be false.

2. Whether the phrase "Do you have reason to believe" in a question predicate to an allegedly perjurious answer is fundamentally ambiguous as a matter of law, and cannot serve as the basis for an indictment for perjury.

3. Whether, under the literal truth rule, a witness may be convicted of perjury for answering "no" to the question "Has anybody ever told you that a sale was rigged?" where no evidence was presented that anyone ever stated to the witness that a sale was "rigged."

LIST OF PARTIES TO PROCEEDING BEFORE NINTH CIRCUIT

The parties to the proceeding before the Ninth Circuit below were Portac, Inc. and Howard L. Wolf.

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HOWARD L. WOLF,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Howard L. Wolf respectfully requests that a writ of certiorari issue to review the judgment and opinion entered by the United States Court of Appeals for the Ninth Circuit in this proceeding on March 9, 1989.

OPINION BELOW

The opinion of the Ninth Circuit is reported at *United States v. Portac, Inc.*, 869 F.2d 1288 (9th Cir. 1989). It is found in the Appendix at pp. 1a through 16a. The Ninth Circuit's order denying Wolf's petition for rehearing and rejecting his suggestion for rehearing en banc is found in the Appendix at p. 23a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 9, 1989. The court denied a timely petition for rehearing on May 15, 1990. The Petition for Writ of Certiorari has been filed within ninety days thereafter. This Court's jurisdiction has been invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTE, AND COURT RULE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property without due process of law . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation . . .

Section 1623 of the federal perjury statute, 18 U.S.C. § 1623 provides, in pertinent part:

> (a) Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> . . .
>
> (e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be neces-

sary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Fed. R. Crim. P. 7 provides in pertinent part:

> (a) Use of Indictment or Information . . . . An offense which may be punished by imprisonment for a term exceeding one year . . . shall be prosecuted by indictment. . . .
>
> . . .
>
> (c) Nature and Contents
>
> (1) In General. The indictment or information shall be a plain, concise and definite statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. . . .

STATEMENT OF THE CASE

Howard L. Wolf was indicted on a single count of perjury under 18 U.S.C. § 1623(a) based on twenty-one alleged false declarations made before a grand jury assembled to investigate possible bid rigging on a United States Forest Service timber sale known as the "Up and Adam" sale.[1] At the time of the Up and Adam sale, Wolf was employed by Portac, Inc. ("Portac"), a sawmill company that was not eligible to bid on Forest Service timber sales because its parent company exports logs.

The indictment against Wolf is set out in pertinent part at pp. 24a through 38a of the Appendix. The in-

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[1] The indictment named Astoria Plywood Corporation, Hoh River Timber, Inc., Portac, Inc. and Wolf. Astoria and Hoh River were charged with conspiracy in restraint of trade under the Sherman Act, 15 U.S.C. § 1. Portac was charged with aiding and abetting the formation of the conspiracy in violation of 18 U.S.C. § 2. Astoria and Hoh River pleaded guilty to the conspiracy charge. Portac was tried together with Wolf and convicted on the aiding and abetting charge.

dictment sets forth the twenty-one alleged false declarations and the questions that preceded them, *see* Appendix 33a-37a, and then alleges falsity as follows:

> 6. The aforesaid declarations . . . were false in that [Wolf]: (1) . . . had *knowledge or information* about *communications, agreements, or bid rigging* between and among representatives or bidders on United States Forest Service timber sales, including Dean Hurn of Hoh River Timber, Inc. and Norm Axon of Astoria Plywood Corporation, pertaining to the March 22, 1985 United States Forest Service Up and Adam timber sale, *or reason to believe that such communications took place* . . .

Appendix 37a (emphasis added).

At trial on the perjury charge, Wolf was acquitted on eleven of the twenty-one alleged false declarations upon a motion made at the close of the government's case. The trial against Wolf then proceeded on the remaining ten alleged false declarations. The jury eventually returned a verdict of guilty on the perjury charge based on only two of the ten remaining statements. Those statements and the questions that preceded them were as follows:

> Q. Do you know whether or not Mr. Hurn had any contact with a representative of Astoria Plywood prior to the Up and At 'Em [sic] timber sale?
>
> A. No. [*Not found false*]
>
> Q. Do you have any reason to believe that he did?
>
> A. No. [*Found false*]
>
> . . .
>
> Q. Has anybody ever told you that a sale was rigged?
>
> A. No. [*Found false*]

The substantive facts underlying the jury's guilty verdict as to these two questions are set forth below.

A. The Timber Sale

The United States Forest Service conducted the Up and Adam timber sale in the Soleduck Ranger District of the Olympic National Forest near Forks, Washington. United States Forest Service bidding procedure calls for interested parties to submit written sealed bids, which are opened and read at the time of the sale, and the sale is then opened for oral bidding. Three written bids were placed on the Up and Adam sale. These bids were placed by Norm Axon and Charles Backman, on behalf of Astoria Plywood Corp. ("Astoria"); Dean Hurn, on behalf of Hoh River Timber, Inc. ("Hoh River"); and Neill Bowman, on behalf of Seattle-Snohomish Inc. ("Seattle-Snohomish"). No oral bids were made on the Up and Adam sale, even though two of the written bids were for the minimum acceptable bid of $515,728, and the third, winning, bid was for a total amount of $20.50 above the minimum acceptable amount. The winning bidder was Astoria.

B. The Meeting at the Sale

The government's primary witness at the trial was Dean Hurn, president of Hoh River, and one of the bidders on the Up and Adam sale. Hurn testified that he went to his office at 8:00 a.m. on the day of the sale to keep an appointment he had to meet with Neill Bowman of Seattle-Snohomish. At that meeting Bowman told Hurn that he wanted logs out of the sale or he was going to bid the sale. Hurn told Bowman that there was a possibility that Seattle-Snohomish would get some logs out of the sale if Hoh River bought the sale.

Hurn also testified that he talked with Wolf on the telephone just prior to going to the sale. Hurn and Wolf discussed the sale because Portac was a regular customer of Hoh River, and was interested in the timber. Hurn told Wolf that he was going to the sale, and "discussed, you know, Astoria being there and . . . the way we left it was that I was to go to the timber sale and

either bid the timber or try to make a, some type of deal with Astoria on the timber sale." Hurn was asked whether Wolf told him to do anything with respect to Hurn's talking to Astoria, and Hurn responded, "Only what we had talked about. . . . To go down, either put a deal together or bid the timber sale. You know I had their blessings, or his blessings, or whatever. . . . I mean, go down and see what Astoria had to say and if there was something that could be done, and if there wasn't, then to bid the timber sale."

The sale was held at the Soleduck Ranger Station. When Hurn went to the sale, he met Norm Axon of Astoria in the parking lot at the ranger station. This meeting had been previously arranged by Elmer Brown, Astoria's manager. Bowman was also present. The three men discussed Astoria buying the sale and splitting the timber among Astoria, Seattle-Snohomish, Hoh River and Hoh River's customer, Portac. Hurn could not recall who suggested this plan. The meeting in the ranger station parking lot at the time of the sale was the only time that Hurn and Axon spoke that day.

As a result of this meeting, Hurn decided not to bid orally against Astoria. Hurn thought that Bowman had made the same decision, although he did not recall Bowman saying anything to that effect. Hurn thought it was just an implicit understanding.

C. Testimony Concerning Other Pre- and Post-Sale Conversations

Hurn testified that after the sale he called for Wolf at Portac. Wolf was not available, so Hurn spoke with C.C. Pittman, president of Portac, and let Pittman know what had happened at the sale. Hurn told Pittman that Portac, Seattle-Snohomish, Astoria and Hoh River would all get wood from the sale. Pittman denied this conversation ever took place.

Hurn did not recall ever discussing with Wolf whether Portac was going to receive logs from the sale. Pittman testified that he had no conversations with Wolf before the sale, and never talked with Hurn about the sale. Pittman also testified that he did not know Axon and did not recall ever having talked with him. Portac never received any logs from the Up and Adam sale.

Norm Axon died before the trial. Astoria's manager, Elmer Brown, testified that after the sale he had no conversations with either Hurn or Wolf about the sale. Over hearsay objections, Brown was allowed to testify that three days after the sale, Axon mentioned that Wolf had called Axon on the night before the sale and asked Axon to have breakfast with Hurn on the morning of the sale. Brown was also allowed to testify that Axon told Brown at the same time about the deal to split the logs. Axon told Brown nothing else about the conversation with Wolf, and did not ever tell Brown that he talked with Wolf about making a deal in the parking lot.

Charles Backman, former assistant timber manager for Astoria, attended the Up and Adam sale. Backman testified that he was surprised there was no oral bidding at the sale, and that about a week later he asked Axon why there had not been competition on the sale. Axon said that a deal had been made with Hoh River; Backman did not ask for any details, because he did not want to know any.

Backman had spoken with Wolf in the weeks prior to the Up and Adam sale because Astoria was looking for a purchaser for hemlock logs. The two discussed log prices and general timber matters, but there was no conversation concerning rigging a bid on the sale. Neither Wolf nor anyone else at Portac ever tried to get Backman to rig a bid or "lay off" a timber sale. Backman did not recall having any conversation with Wolf about the Up and Adam sale after it occurred.

D. One Year After the Sale

Hurn testified that about a year after the Up and Adam sale, Axon took Hurn aside and told him that a grand jury was investigating the sale. Axon told Hurn that he was not going to follow through on the deal for distributing logs from the sale. No one from Portac was present at the time of this conversation. Hurn later talked to Wolf, and relayed to Wolf that Axon had said Axon was fearful of the investigation, and that Astoria was going to keep the logs. Hurn did not recall Wolf saying anything in response.

No other testimony relevant to Wolf's knowledge of a meeting between Hurn and Axon, or Wolf's "reason to believe" that such a meeting actually took place, was presented. No testimony at all was presented that anyone made any statements to Wolf about "bid rigging," or told Wolf that a sale was "rigged."

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW THAT THE INDICTMENT AGAINST WOLF WAS SUFFICIENT VIOLATES WOLF'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Fed. R. Crim. P. 7 gives effect to the Fifth Amendment right to be tried only upon an indictment. Advisory Committee Note, Fed. R. Crim. P. 7(a). The nature and contents of an indictment are governed by Fed. R. Crim. P. 7(c)(1). Although the formal, technical rules previously applicable to preparing an indictment have been superseded by Rule 7(c)(1), *United States v. Bickford*, 168 F.2d 26, 27 (9th Cir. 1948), an indictment prepared pursuant to this rule must not fail to safeguard the accused's Fifth Amendment right to due process of law and to protection from double jeopardy, and his Sixth Amendment right to be informed of the nature and cause of the accusation against him. *Russell v. United*

States, 369 U.S. 749, 762-64 (1962); *United States v. Riviera*, 837 F.2d 906, 917 (10th Cir. 1988), *judgment vacated on other grounds and clarified by* 900 F.2d 1462 (10th Cir. 1990).

This Court's decision in *Russell v. United States*, *id.*, sets forth the principles governing the constitutional sufficiency of an indictment under the Fifth and Sixth Amendments. These principles were summarized by the Tenth Circuit Court of Appeals in its opinion in *United States v. Riveria*:

> Mere technical deficiencies in an indictment of no prejudice to the defendant do not result in the abridgment of sixth amendment and due process rights. . . . Prejudice does arise, however, if either an indictment fails to sufficiently apprise a defendant "of what he must be prepared to meet" or if the defendant would not be "fully protected from again being put in jeopardy for the same offense." *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240 (1962). . . . *Russell* makes clear that the sufficient-notice prong is separate from the double-jeopardy prong . . . and failure under either prong requires reversal.

837 F.2d at 917. Under the *Russell* test, an indictment is insufficient unless it:

> furnish[es] the defendant with a sufficient description of the charges against him [a] to enable him to prepare his defense, [b] to ensure that the defendant is prosecuted on the basis of facts presented to the grand jury, [c] to enable him to plead jeopardy against a later prosecution, and [d] to inform the court of the facts alleged so that it can determine the sufficiency of the charge. . . . To perform these functions, the indictment must . . . contain a statement of the facts and circumstances that will inform the accused of the specific offense with which he is charged.

United States v. Cecil, 608 F.2d 1294, 1296 (9th Cir. 1979); *see also United States v. Cruikshank*, 92 U.S. 542

(1975).[2] At trial, and again on appeal to the Ninth Circuit, Wolf argued that the indictment against him was insufficient because it failed to set forth the true facts upon which he was alleged to have had "reason to believe" that Hurn and Astoria communicated prior to the Up and Adam sale. In its opinion below the Ninth Circuit rejected Wolf's argument on the grounds that "the old formal averments of truth in a perjury indictment are no longer required; it is enough that the indictment " 'shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.' "." *United States v. Portac*, 869 F.2d 1288, 1295 (9th Cir. 1989) (quoting *United States v. DeCoito*, 764 F.2d 690, 693 (9th Cir. 1985) (quoting Fed. R. Crim. P. 7(c)(1))). The court below reasoned that because the answers for which Wolf was indicted were categorical ("no"), and because the indictment alleged that these answers were false, "the opposite truth is apparent without the need for a particular averment." *Portac* at 1296.

The Ninth Circuit's reasoning is at odds with *Russell*. The conclusion that Wolf's answer to the "reason to believe" question was false depends upon an inference that must be drawn from certain facts, facts which are not set out in the indictment. Without a factually specific truth allegation, the indictment is insufficient under the first prong of the *Russell* test. The indictment did not apprise Wolf of the specific facts compelling a conclusive inference that Hurn and representatives of Astoria *actually* had a meeting prior to the Up and Adam sale. The form of the indictment forced Wolf to guess at which facts the prosecution intended the jury to rely on in reaching its verdict, thereby depriving him of the op-

[2] The Court in *Cruikshank* stated that an important purpose of an indictment is "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone." 92 U.S. at 593. This principle "retains undiminished vitality . . . ." *Russell*, 369 U.S. at 767 n.15.

portunity to prepare an adequate defense to the charge, as required by *Russell.*

In addition, the form of the indictment was insufficient to enable the court to determine the sufficiency of the charge, as also required by *Russell* and by *Cruikshank, id.* In the absence of a specific statement in the indictment of the facts allegedly known to Wolf and upon which Wolf allegedly had "reason to believe" that Hurn actually contacted representatives of Astoria prior to the sale, the trial jury could have convicted Wolf of perjury based upon facts not relied upon by the grand jury that indicted Wolf. This result is prohibited by this Court's decision in *Russell*:

> To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

369 U.S. at 770. Although Fed. R. Crim. P. 7(c)(1) abolished formal, technical rules of pleading, it did not eliminate the necessity for a factually specific statement of the basis for the allegation of falsity in the indictment. In *United States v. DeCoito*, 764 F.2d 690 (9th Cir. 1985), relied on by the court below, the questions put to the defendant contained all of the facts necessary to understand the allegation that the defendant's answer was false. Where the basis for the charge of falsity cannot be understood without facts not presented in the predicate questions, however, this Court's decisions in *Russell* and *Cruikshank* require a perjury indictment to contain a specific statement of facts supporting the allegation of falsity.

II. THE DECISION BELOW WIDENS AN EXISTING SPLIT AMONG THE CIRCUITS CONCERNING THE NECESSITY FOR A TRUTH PARAGRAPH IN A PERJURY INDICTMENT.

The indictment returned against Wolf alleges that he made statements to the grand jury investigating the Up and Adam sale that were false, but it does not set forth the specific facts that the government relied on as the basis for its allegation of falsity. The circuit courts of appeal have split over whether a statement of the specific facts supporting the allegation of falsity is required in order to satisfy constitutional principles governing the sufficiently of a perjury indictment. The Third and Sixth Circuits require that a perjury indictment contain a truth paragraph that sets out the alleged false declaration and the truth of the matter in "stark contrast." *United States v. Tonelli*, 577 F.2d 194, 195 (3d Cir. 1978); *United States v. Slawik*, 548 F.2d 75, 83 (3d Cir. 1977); *United States v. Eddy*, 737 F.2d 564, 567 (6th Cir. 1984). In opinions issued prior to that of the court below in this case, the Ninth Circuit has applied essentially the same rule. *United States v. Schulman*, 817 F.2d 1355, 1360 (9th Cir. 1987), *cert. dismissed*, 483 U.S. 1042 (1987), *appeal after remand*, 889 F.2d 1097 (9th Cir. 1989), *petition for cert. filed* May 15, 1990; *United States v. Cowley*, 720 F.2d 1037, 1042 (9th Cir. 1983), *cert. denied*, 465 U.S. 1029 (1984).

The Second and Fifth Circuits, in contrast, have applied the rule that a perjury indictment need not contain any statement of truth whatsoever. *United States v. Marchisio*, 344 F.2d 653, 662 (2nd Cir. 1965); *United States v. Hiss*, 185 F.2d 822, 831 (2nd Cir. 1950), *cert. denied*, 340 U.S. 948 (1951); *United States v. Barnhart*, 889 F.2d 1374, 1378 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 1307 (1990); *United States v. Oberski*, 734 F.2d 1034 (5th Cir. 1984). The Seventh Circuit generally follows the Fifth Circuit. *United States v. Serola*, 767 F.2d 364, 370 (7th Cir. 1985).

With its opinion in this case, the court below effectively has abandoned the rule of the Third and Sixth Circuits, and has applied the rule of the Second and Fifth Circuits. This becomes apparent upon a close examination of its opinion. Earlier Ninth Circuit cases have held that where there is ambiguity in the questions underlying the charge or where the questions are susceptible of more than one interpretation, a statement of facts as to the truth of the matter is required. *United States v. Cowley*, 720 F.2d at 1043; *United States v. Shulman*, 817 F.2d at 1360. In this case, however, the court below held that where the defendant's answers are categorical, and the opposite answer is apparent, the indictment need not make any statement as to the nature of the truth. *United States v. Portac*, 869 F.2d at 1286.

In so holding, the court below relied upon the case of *United States v. DeCoito*, *id.* *DeCoito* held that where the questions put to the defendant concerned plain statements of physical acts, each of which the defendant denied having performed, "[i]t would have been superfluous for the indictments to include a separate paragraph restating those questions in the form of a truth averment." 764 F.2d at 693. The questions put to Wolf, however, were of a completely different character than those put to DeCoito. Wolf was first asked, "Do you know whether or not Mr. Hurn had any contact with a representative of Astoria Plywood prior to the . . . timber sale?" This question asks whether Wolf had actual knowledge that contact took place. Wolf replied "no," and that answer was not found false. Wolf next was asked, "Do you have any reason to believe that he did?" This question calls for Wolf to draw an inference or reach a conclusion as to one of two events—either that contact *did* occur, *or* that it *could have* or *might have* occurred. Which event the question concerns is not made clear. Because the preceding question concerns whether Hurn actually had contact with Astoria prior to the sale, the context indicates that the question concerns knowledge of events that

did occur. If so, the allegation that Wolf's answer to this question—"no"—was false, assumes that at the time of his answer Wolf had knowledge of facts that inexorably led to the conclusion that contact actually did take place. These questions contained considerable room for interpretation, and misinterpretation, by Wolf. In applying *DeCoito* to these circumstances, the court below aligned itself with courts that do not require a statement of specific facts in a perjury indictment even where ambiguity in the questions is apparent. *See, United States v. Oberski*, 734 F.2d at 1035.

The Ninth Circuit's sudden departure from the rule of its former cases highlights the need for this Court's guidance in this area. The courts of appeal take strikingly different approaches to perjury cases involving ambiguous questions. The resulting uncertainty places too great a burden on grand jury witnesses. In the instant case, for example, the rule of the court below punishes the defendant for failing to volunteer information the prosecution later deemed relevant. It is a well-established rule that the prosecution should ask precise questions, and where the answers of the witness disclose too little, the remedy is further probing and questioning, not a perjury charge. *Bronston v. United States*, 409 U.S. 352 (1973); *United States v. Schulman*, 817 F.2d at 1360; *United States v. Cowley*, 720 F.2d at 1042.

This Court's guidance is needed in this case not only because a conflict among the circuits exists, but also because there is a question whether the approach of the Second and Fifth Circuits meets the test of constitutional sufficiency outlined in *Russell*. For instance, the Second and Fifth Circuits leave ambiguities in the indictment to be addressed by a bill of particulars. *See e.g., United States v. Oberski, id.* This Court has long held, however, that "a bill of particulars cannot save an invalid indictment." *Russell*, 369 U.S. at 770. The indictment must contain all the information necessary to establish the

elements of the offense. *Id.* at 763. Because falsity is an essential element of a perjury charge, the presentation of the element of falsity in an indictment is incomplete unless the true facts appear on the face of the charge. Where the question itself fails to include all the necessary facts, a truth paragraph alleging those facts is required by *Russell.* A bill of particulars will not suffice.

The rule applied to indictments by the Third and Sixth Circuits in contrast, recognizes that where the questions are ambiguous or incomplete, the indictment must contain additional specific facts supporting the allegation of falsity since:

> [t]o hold otherwise would permit the trial jury to inject its inferences into the grand jury's indictment, and would allow defendants to be convicted for immaterial falsehoods or for "intent to mislead" or "perjury by implication"—which [the decision of the Supreme Court in] *Bronston* [*v. United States*] has] specifically prohibited.

United States v. Slawik, 548 F.2d at 83-84 (citation omitted). The Third and Sixth Circuit rule is constitutionally sufficient under *Russell.* 369 U.S. 764-765. The Second and Fifth Circuit rule is not. *Id.*

III. THE DECISION OF THE COURT BELOW ERRONEOUSLY UPHOLDS A FEDERAL PERJURY CONVICTION BASED ON A FUNDAMENTALLY AMBIGUOUS QUESTION.

The court below held that the "reason to believe" question asked of Wolf was not fundamentally ambiguous. *Portac*, 869 F.2d at 1296. In so holding it relied upon the test of ambiguity set forth by the court in *United States v. Lighte*:

> A question is fundamentally ambiguous when it . . . is not a phrase with a meaning about which men of ordinary intelligence could agree, nor one which could be used with mutual understanding by a

> questioner and answerer unless it were defined at the time it were sought and offered as testimony. . . . .

782 F.2d 367, 375 (2nd Cir. 1986) (citation omitted).[3] Applying the *Lighte* test, the court below concluded that when viewed "in the context in which it was asked, the question to Wolf was quite understandable." *Portac*, *id.*

In so holding, however, the court ignored the fact that the "reason to believe" question required Wolf to draw inferences about the conduct of others. The allegation in the indictment that Wolf's answer to the question was false is predicated on a conclusion or assumption that Wolf knew certain facts, and that the inference that a pre-sale meeting between Hurn and Axon actually took place was the sole inference that could be drawn from those facts. The question "Do you have reason to believe [x]" is fundamentally ambiguous and cannot serve as the basis of a perjury charge in any context unless the specific facts from which the inference that the event occurred is to be drawn are identified. This becomes apparent if the meaning of the phrase "reason to believe" is analyzed.

"Belief" has been defined as "mental acceptance of or conviction in the truth or actuality of something." *American Heritage Dictionary* 169 (New College Edition, 1976). "Reason" means "an underlying fact or cause that provides logical sense for a premise or occurrence." *Id.* at 1031. Without further definition, all that the question "Do you have reason to believe that [Hurn and Axon met prior to the sale]?" means is "Do you know of a fact that logically leads to the conviction that Hurn and Axon actually met prior to the sale." Wolf's response, "no," says that he does not know of a fact that logically leads

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[3] Although the Second Circuit has consistently refused to find indictments predicated on ambiguous questions insufficient, it does recognize a "fundamentally ambiguous" defense to a perjury charge. *Id.*

him to a conviction that such a meeting actually occurred. Perjury exists only where the defendant's response was false as the defendant understood it. *Lighte*, 782 F.2d at 375. Wolf's response would not have been sufficient to constitute perjury unless specific facts were identified in the context of the question that persons of ordinary intelligence could agree logically would lead to a conviction in the actuality of such an event.

Thus the defect in the question asked Wolf was its lack of factual particularity. The question is similar in this respect to questions that the court in *Lighte* held were fundamentally ambiguous. The defendant in *Lighte* was asked a series of questions relating to the handling of bank accounts by the defendant both in his capacity as a trustee and as an individual. The court held that certain of these questions were fundamentally ambiguous because the questions could have referred to the defendant's activities in either capacity, and the answers were true as to his individual activities. 782 F.2d at 375. The defect in the questions was that "[n]one contained language . . . which would particularize the inquiry and clearly inform the [defendant] as to what was being asked." *Id.*

The decisions of other courts also support the proposition that where a witness is asked a question susceptible of more than one reasonable interpretation, as to one of which the witness has truthfully answered, that question cannot be the predicate for a perjury conviction. *United States v. Clifford*, 426 F. Supp. 696, 705-706 (E.D.N.Y. 1976); *United States v. Cook*, 489 F.2d 286, 287 (9th Cir. 1973), adopting reasoning of Ely, dissenting, in *United States v. Cook*, 497 F.2d 753 (9th Cir. 1972); *United States v. Spalliero*, 602 F. Supp. 417, 422 (C.D. Calif. 1984); *see also*, *Bronston v. United States*, 409 U.S. 352 (1973). As these cases make clear, a question can be a proper predicate for a perjury charge only if it is not susceptible to multiple interpretations, or if it is clear from the context that the defendant knew what the

question meant when it was asked. In the case of a "reason to believe" question, even if persons of ordinary intelligence are clear as to the meaning of the phrase, a "no" answer to the question cannot be interpreted as false unless the set of facts supporting the inference called for are equally clear. This Court should accept review in this matter in order to clarify that a defendant may not properly be convicted of a federal perjury charge where there is fundamental ambiguity in the questions forming the basis for the charge.

IV. THE DECISION BELOW VIOLATES THE PRINCIPLES ESTABLISHED BY THIS COURT'S OPINION IN *BRONSTON v. UNITED STATES.*

In *Bronston v. United States*, 409 U.S. 352 (1973), this Court held that a literally true statement cannot form the basis for a perjury prosecution, even where the statement is misleading or unresponsive to the question asked. The court below ignored this principle when it held that the evidence at trial was sufficient to convict Wolf of perjury for answering "no" to the question "Has anybody ever told you that a sale was rigged." *Portac*, 869 F.2d at 1296. The court admitted that "there is no direct testimony by anyone saying that he told Wolf point blank that the sale was rigged," but held that there was evidence from which the jury could infer that Wolf received information tantamount to being told the sale was "rigged." *Id.* It is irrelevant that certain persons made statements to Wolf implying that bid rigging had occurred. The question put to Wolf was "Has anybody ever told you that *a sale was rigged.*" To this question Wolf truthfully answered "no." If the prosecution wished to know what Wolf had been told that might imply that a sale was rigged, it was free to ask him specific questions aimed at discovering that information. In the oft-quoted words of this Court,

> It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in par-

> ticular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.

Bronston, 409 U.S. at 358-59.

The decision of the court below also violates the *Bronston* rule with respect to Wolf's conviction for his answer to the "reason to believe" question. In context, that question asked whether Wolf had any "reason to believe" that Hurn actually met with Astoria prior to the timber sale. The court below stated that Hurn's testimony that he talked with Wolf prior to the sale and told Wolf that he was going to the sale to " 'see what Astoria had to say and if there was something that could be done, and if there wasn't, then to bid the sale,' " 869 F.2d at 1296, was enough to permit the jury to conclude that Wolf had reason to believe the contact had taken place. In fact, the most that this evidence supports is that Hurn *may have* or *could have* met with Astoria. This evidence is not sufficient to support the conclusion by Wolf that the meeting *in fact took place*. The "no" answer given by Wolf to the "reason to believe" question was therefore literally true. Wolf did not have "reason to believe" the meeting actually took place; at most, he had reason to believe that it could have taken place. This is not enough to support a conviction for perjury. *See Bronston*, 409 U.S. at 358.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Dated this 28th day of June, 1990.

Respectfully submitted,

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June 28, 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-3132

D.C. No. CR-87-37-JCC

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
PORTAC, INC.,
Defendant-Appellant.

No. 87-3178

D.C. No. CR-87-37-C

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
HOWARD L. WOLF,
Defendant-Appellant.

OPINION

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted
July 12, 1988—Seattle, Washington

Filed March 9, 1989

Before: Cecil F. Poole, William C. Canby, Jr. and Edward Leavy, Circuit Judges

Opinion by Judge Canby

Irwin H. Schwartz, Seattle, Washington, for the defendant-appellant Portac, Inc.

Nick Verwolf, Seattle, Washington, for the defendant-appellant Wolf.

Marion L. Jetton, Department of Justice, Washington, D.C., for the plaintiff-appellee.

OPINION

CANBY, Circuit Judge:

Portac, Inc., a sawmill company, and Howard Wolf, an employee of Portac, appeal criminal convictions stemming from a conspiracy to rig bidding on a government timber sale held on March 22, 1985. Portac was charged with aiding and abetting the formation of a conspiracy in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), and 18 U.S.C. § 2 (1982). Howard Wolf was charged with making false material declarations under oath, before a grand jury investigating the rig bidding. 18 U.S.C. § 1623 (1982). We affirm both convictions.

FACTS

On February 18, 1985, the U.S. Forest Service advertised that an estimated 8,100,000 board feet of timber in Soleduck Ranger District would be auctioned on March

22, 1985, by competitive bidding. The sale was known as the "Up and Adam" timber sale. Three companies, Hoh River Timber Inc., ("Hoh River"), Astoria Plywood Corp., ("Astoria"), and Seattle-Snohomish Inc., ("Sea-Sno") submitted sealed bids, and were the only companies represented at the sale. Hoh River and Sea-Sno bid the minimum acceptable amount ($515,728) established by the Forest Service. Astoria bid $20.50 above the minimum amount. Evidence was introduced which tended to show that Hoh River had originally been prepared to bid up to $791,000. Although oral bids were allowed after the opening of the sealed bids, none of the three companies made an oral bid. The sale accordingly went to Astoria.

On February 23, 1987, a federal grand jury indicted Astoria, Hoh River, Portac Inc. ("Portac") and Howard Wolf, Portac's timber manager. Astoria and Hoh River were charged with conspiracy in restraint of trade, in violation of Section 1 of the Sherman Act, 15 U.S.C. §1. The conspiracy was an agreement to refrain from bidding competitively against Astoria, which would then allocate logs from the sale among the conspirators and Portac. Astoria and Hoh River pleaded guilty to this conspiracy charge.[1] Portac was charged with having "willfully aided, abetted, counseled, commanded, induced or procured" the formation of the conspiracy in violation of 18 U.S.C. § 2. Wolf was charged with making false material declarations under oath before the grand jury, in violation of 18 U.S.C. § 1623.

The government's prime witness at trial was Dean Hurn. As president and manager of Hoh River, Hurn was responsible for bidding on Forest Service timber. Hurn's testimony revealed that Hoh River was interested in bidding on the sale because of the timber's location

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[1] Astoria and Hoh River were also charged with other offenses, but those charges were dismissed when they pleaded guilty to conspiracy.

and because "[i]t is very high grade wood." The day before the sale, Hurn and Wolf spoke and discussed Portac's desires for timber from the sale. Portac itself was not eligible to bid, because its parent company exports logs.

Hurn and Wolf also discussed the deal, by phone, on the morning of the sale. Hurn testified that, "I . . . told [Wolf] that I was going to go see Norm Axon from Astoria Plywood. . . . I told Howard I was going to go down to the auction and we discussed, . . . Astoria being there and Howard, the way that we left it was that I was to go to the timber sale and either bid the timber sale or try to make a, some type of a deal with Astoria on the timber sale." Wolf instructed Hurn to "see what Astoria had to say" about a deal and also informed him that Sea-Sno's buyer "wanted logs out [of] that timber sale."

On the morning of the sale, Norm Axon, (Astoria's timber manager), Neill Bowman, (Sea-Sno's timber manager), and Hurn met in the parking lot of the Soleduck Ranger Station. Bowman told Hurn "that . . . he wanted logs out of that sale or was going to bid the timber sale." Hurn responded that Bowman "could get some logs out of that sale . . . if we bought the sale." The three buyers then worked out the distribution of logs. Hurn's company would get the Hemlock and the other three companies (two bidders and Portac) would get the Douglas Fir. "[I]t was agreed that [Astoria would] buy the sale, [and] that [Hurn] wouldn't bid against them." When the sealed bids were opened, Hurn did not bid because he had agreed not to bid against his competitors.

After the auction Hurn called Wolf at Portac. Because Wolf was not available, Hurn spoke to Portac's president, Smokey Pittman, and "let him know what happened at the timber sale." The agreed division of logs from the Up and Adam Sale never came to pass. Approximately one year later, when Astoria's Norm Axon learned that

a grand jury was investigating the sale, he announced that the agreement was off and Astoria would keep the logs.

Wolf testified at length before the grand jury, and he was ultimately charged with making 21 false declarations. He and Portac were tried together. Wolf was convicted of only two false statements, those being his answers to the last two of the following questions:

> Q. Do you know whether or not Mr. Hurn had any contact with a representative of Astoria Plywood prior to the Up and At 'Em [sic] timber sale?
>
> A. No.
>
> Q. Do you have any reason to believe that he did?
>
> A. *No.*
>
> * * * *
>
> Q. Has anybody ever told you that a sale was rigged?
>
> A. *No.*

After reaching a verdict separately against Wolf, the jury advised the court that it was unable to reach a verdict with regard to Portac and requested that the trial testimony of Dean Hurn be read to it. The judge read Hurn's testimony to the jury. Shortly thereafter a verdict of guilty was returned against Portac.

ISSUES

Portac and Wolf raise a number of issues, with some overlap. They may be stated as follows:

Portac:

(1) Does the charge of aiding and abetting the formation of a conspiracy state an offense?

(2) Was the evidence sufficient to convict?

(3) Were the aiding and abetting charges against Portac improperly joined with the perjury charges against Wolf?

(4) Were statements of the deceased Norm Axon improperly admitted through hearsay?

(5) Did the prosecutor engage in improper final argument amounting to plain error?

(6) Did the trial court err in reading Hurn's testimony to the jury at its request?

Wolf:

(1) Did the indictment sufficiently allege perjury?

(2) Was the evidence sufficient to convict?

(3) Did the trial court err in admitting into evidence:

(a) testimony regarding statements of the deceased Norm Axon?

(b) guilty pleas of Astoria and Hoh River?

(c) telephone records of calls between the conspirators and Portac or Wolf?

(d) testimony regarding a statement made by Wolf?

(4) Did the trial court err in refusing to poll the jury until both verdicts were in?

DISCUSSION—PORTAC

Sufficiency of the Indictment

Portac concedes that it is a crime to aid and abet an existing conspiracy, *see, e.g., United States v. Lane*, 514 F.2d 22, 26-27 (9th Cir. 1975), but contends that it is not a crime to aid and abet the *formation* of a conspiracy.

This argument overlooks the nature of the aiding and abetting statute, 18 U.S.C. § 2, which renders punishable as a principal anyone who "aids, abets, counsels, commands, induces or procures" the commission of an offense. One purpose of this provision is to make the former "accessory before the fact" a principal, and persons who aid in bringing about the later commission of a crime fall within its purview. *See Robinson v. United States*, 262 F.2d 645, 649-51 (9th Cir. 1959) (quoting *Morei v. United States*, 127 F.2d 827, 830-32 (6th Cir. 1942)); *United States v. Barnett*, 667 F.2d 835, 841 (9th Cir. 1982). Thus "one can aid and abet a conspiracy by bringing the parties together to enter into an illicit agreement." *United States v. Galiffa*, 734 F.2d 306, 309 (7th Cir. 1984). Portac's challenge to the indictment is therefore not well taken.

Sufficiency of the Evidence

With regard to our review of the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Portac contends that this minimal standard is not met because there is no evidence that Wolf knew of the meeting in the parking lot just before the sale, or that he shared the criminal intent of the conspirators. But the mere fact that Wolf may not have anticipated exactly when and where the meeting would take place is not enough to upset the verdict. One can aid and abet a conspiracy without knowing all the particulars. *United States v. Lane*, 514 F.2d at 27. There was evidence that Wolf was in contact with Axon and Hurn before the meeting, that he urged them to agree on the terms of the sale, and that he told Hurn to try first to get an agreement and to bid competitively only as an alternative. There was also evidence of post-sale conduct and communications by Wolf

that indicated continuing support and participation in the agreed arrangement. From this evidence, a rational jury could find beyond a reasonable doubt that Wolf had aided and abetted the conspirators in getting together to rig the bids, and that he intended that result.

Portac contends that the actions of Wolf are not attributable to Portac because Pittman, Wolf's boss, had told Wolf that the company did not permit violation of any laws. But Wolf was Portac's sole purchaser of timber from Forest Service sales. "[A] corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent." *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). Wolf's acts are accordingly attributable to Portac.

Prejudicial Misjoinder

Portac next argues that it was unduly prejudicial to join Wolf's perjury charge with the Sherman Act count against Portac. Portac argues that the perjury was not part of the common scheme, and that Wolf, unlike those in other joint perjury trials, was not charged with the substantive offense. *United States v. Barney*, 568 F.2d 134, 136 (9th Cir.) *cert. denied*, 435 U.S. 955 (1978).

Rule 8(b), Fed. R. Crim. P., provides that "[t]wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction constituting an offense or offenses." The rule is to be construed broadly in favor of joinder. *United States v. Ford*, 632 F.2d 1354, 1373 (9th Cir. 1980) (*cert. denied sub nom. Armstrong v. United States*, 450 U.S. 934 (1981). Joinder is proper when the same facts must be adduced to prove each of the joined offenses. *United States v. Satterfield*, 548 F.2d 1341, 1344 (9th Cir. 1977), *cert. denied*, 439 U.S. 840 (1978). In

the present case, the charges against Portac and Wolf both relate to the bid rigging agreement and require the establishment of the conspiracy and Wolf's relation to it. "[T]he facts underlying the joined offenses were [therefore] so intertwined that most of the evidence admissible in proof of one was also admissible in proof of the other." *Barney*, 568 F.2d at 135. The two offenses were thus properly joined.

Axon Hearsay

The district court permitted Elmer Brown, Astoria's general manager, to testify to certain statements made by his timber buyer, Norm Axon, who died prior to trial. Brown testified that, three days after the Up and Adam Sale, Axon told him that Wolf had called him (Axon) the day before the sale and had asked Axon to meet with Hurn at breakfast on the morning of the sale. Brown also testified that Axon told him that the "four of them" (meaning Axon, Hurn, Bowman and Wolf) had met in the parking lot before the sale and had rigged the bidding. It was apparent from all of the other evidence that the latter statement was wrong in saying that Wolf had been present; the government concedes that he was not at the meeting in the parking lot.

The district court admitted the testimony as statements of a coconspirator "during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). Portac contends that Axon's statements do not qualify for admission because Portac (acting through Wolf) was not part of the conspiracy. But neither Portac nor Wolf need be charged or convicted as a conspirator with Axon or Astoria in order for Axon's statement to be admissible under Rule 801(d)(2)(E); participation as an aider and abettor is sufficient. *United States v. Fried*, 576 F.2d 787, 794 n.8 (9th Cir.), *cert. denied*, 439 U.S. 895 (1978). A concert of action creates a coconspiracy for purposes of the evidence rule. *United States v. Ushakow*,

474 F.2d 1244, 1245 (9th Cir. 1973); *United States v. Williams*, 435 F.2d 642, 645 (9th Cir. 1970), *cert. denied*, 401 U.S. 995 (1971).

Portac also argues that, because Axon's statements were made to Brown three days after the Up and Adam Sale, they could neither have been uttered during the conspiracy nor be in furtherance of it. The conspiracy need not be viewed that narrowly, however; an agreement was made to rig the bidding and to divide the logs from the sale. Indeed, the subsequent division was the prime incentive for the other conspirators to permit Astoria to win the bidding without competition. Because the objects of the conspiracy were still to be accomplished, Axon's statements were timely. *See United States v. Bloch*, 696 F.2d 1213, 1215 (9th Cir. 1982) (conspiracy presumed to continue until there is affirmative evidence of abandonment). Moreover, Axon's statements furthered the intended division of logs to Portac, by indicating to Brown that Wolf and Portac had helped Astoria to win the rigged bidding.

Axon's statements were therefore admissible under the coconspirator exception to the hearsay rule. By reason of that fact, they did not violate Portac's right to confrontation. *Bourjaily v. United States*, 107 S.Ct. 2775, 2782 (1987).[2]

Prosecutor's Closing Argument

In closing, the prosecutor argued that Wolf's motive in arranging the bid-rigging meeting was to keep log costs down and so "to do that he had to bring the bidders together, to encourage the bidders to make a deal, and that is what Howard Wolf did before the Up and Adam Sale." Portac argues that this statement was improper because there was no evidence that Wolf knew of the meeting in

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[2] Our disposition of this issue makes it unnecessary to rule upon the district court's alternative ground that Axon's statements qualified as admissions against interest. Fed. R. Evid. 804(b)(3).

the parking lot. It is not necessary for conviction, however, that Wolf and Portac intended the meeting of the conspirators to occur at the exact time and place that it did. There was evidence that Wolf aided in bringing the conspirators together just before the sale. Whether the meeting occurred at breakfast, as Wolf suggested to Axon, or a few hours later in the parking lot, is not crucial. The prosecutor's argument, having support in the evidence and the reasonable inferences to be drawn from it, was not improper. In closing argument, both parties are allowed to " 'strike 'hard blows' based upon the testimony and its inferences.' " *United States v. Birges*, 723 F.2d 666, 671-72 (9th Cir.), *cert denied*, 466 U.S. 943 and 469 U.S. 863 (1984) (quoting *United States v. Gorostiza*, 468 F.2d 915, 916 (9th Cir. 1972)). There was no plain error [3] in the prosecutor's statements.

Reading of Hurn Testimony

Finally, Portac argues that the district court abused its discretion when it acceded to the jury's request and read Hurn's testimony. Portac contends that when the jury was initially unable to reach a verdict the judge should then have called a mistrial. *See Rogers v. United States*, 609 F.2d 1315, 1317 (9th Cir. 1979). While the reading of testimony is disfavored, *United States v. De Palma*, 414 F.2d 394, 396 (9th Cir. 1969), *cert denied*, 396 U.S. 1046 (1970), a trial court enjoys great latitude in deciding whether to read testimony requested by a jury. *United States v. Nolan*, 700 F.2d 479, 486 (9th Cir.) *cert. denied*, 462 U.S. 1123 (1983); *United States v. King*, 552 F.2d 833, 850 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977). The trial court cautioned the jury about the danger of concentrating on the testimony of only one witness and instructed the jurors to reach their

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[3] We review for plain error because there was no objection to the prosecutor's argument. *United States v. Solomon*, 825 F.2d 1292, 1300 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 782 (1988).

decision on the basis of all of the evidence. In light of the entire circumstances, the reading of Hurn's testimony was not an abuse of the district court's broad discretion.

DISCUSSION—WOLF

Sufficiency of the Indictment

Wolf contends that the indictment against him was deficient in several respects. First, he contends that the indictment failed to set the truth out in "stark contrast" to his allegedly false answers. He contends that the indictment's statement of the truth was impermissibly disjunctive. But the old, formal averments of truth in a perjury indictment are no longer required; it is enough that the indictment " 'shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.' " *United States v. DeCoito*, 764 F.2d 690, 693 (9th Cir. 1985) (quoting Fed. R. Crim. P. 7(c)(1). In this case, the answers for which Wolf was convicted were categorical:

> Q. Do you know whether or not Mr. Hurn had any contact with a representative of Astoria Plywood prior to the UP and At 'Em [sic] timber sale?
>
> A. No.
>
> Q. Do you have any reason to believe that he did?
>
> A. *No.*
>
> * * * *
>
> Q. Has anybody ever told you that a sale was rigged?
>
> A. *No.*

The indictment alleged that these answers were false; the opposite truth is apparent without the need for a particular averment. Wolf was given sufficient notice to

permit him to prepare his defense, and the allegations are sufficiently precise to protect him from double jeopardy. The indictment was therefore sufficiently definite. *United States v. Bohonus*, 628 F.2d 1167, 1173 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980).

We also reject Wolf's contention that whether he had "reason to believe" that Hurn had met with a representative of Astoria before the sale was inherently so ambiguous that it could not support a conviction. The meaning of the question must be considered in context, and the issue is whether persons of ordinary intelligence could agree on the meaning of the language or use it with mutual understanding. *United States v. Lighte*, 782 F.2d 367, 375 (2d Cir. 1986). We conclude that, in the context in which it was asked, the question to Wolf was quite understandable.

Sufficiency of the Evidence

Wolf contends that there was insufficient evidence to sustain his conviction for either of the two answers that the jury found to be false. We disagree. Hurn testified that he talked to Wolf on the telephone just prior to the sale, and told him that he was going to "go down and see what Astoria had to say and if there was something that could be done, and if there wasn't, then to bid the timber sale." This evidence was enough to permit the jury to find beyond a reasonable doubt that Wolf had reason to believe that Hurn contacted Astoria before the sale. Additional reason to believe may be found in Wolf's telephone call to Astoria's Axon the night before the sale, urging him to have breakfast with Hurn.

The evidence to support the falsity of Wolf's other answer, that nobody had ever told him that a sale was rigged, is more circumstantial but still sufficient. It is true that there is no direct testimony by anyone saying that he told Wolf point-blank that the sale was rigged. There was evidence, however, from which the jury could

infer that Wolf was told of the results of the sale by telephone. There was also testimony by Hurn that he conveyed to Wolf the statement of Axon that the deal for division of the logs was off because the sale was under investigation. If, contrary to our view, this evidence is not sufficient to establish that anybody "told" Wolf that "a sale was rigged," the deficiency would not require reversal. Wolf's conviction of the single count of perjury was supported by the jury's finding that he answered each of the two questions falsely. Either finding supports the conviction.

Evidentiary Issues

The first of Wolf's contentions, that Elmer Brown's testimony regarding the statements of Norm Axon should not have been admitted, is disposed of in our discussion of the same issue raised by Portac. The statements were admissible under Fed. R. Evid. 801(d)(2)(E).

Wolf next argues that it was error to admit the guilty pleas entered by Astoria and Hoh River. The government was entitled, however, to disclose the terms of the plea agreements of those two companies in order for the jury to assess the credibility of their two officers, Brown and Hurn, who testified against Wolf. *See United States v. Roberts*, 618 F.2d 530, 535 (9th Cir. 1980), *United States v. Brighton Bldg. & Maintenance Co.*, 598 F.2d 1101, 1109 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979). The trial court instructed the jury that the convictions were to be considered only for purposes of credibility of the witnesses. We find no abuse of discretion.

Wolf also contends that the trial court erred in admitting telephone records showing calls between Astoria, Hoh River, Portac and Wolf. He argues that the records should not have been admitted without evidence concerning the identity of the callers and the subjects of the conversation. The records, however, are probative of the fact that calls were made at the times indicated.

The jury was entitled to consider that fact along with all the other circumstances that tended to show a conspiracy to rig the bidding. *See United States v. Polizzi*, 500 F.2d 856, 905-06 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975); *United States v. Roselli*, 432 F.2d 879, 896 n.31 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971).

At trial, Marvin McDougal testified that, about one year after the Up and Adam Sale, Wolf explained to McDougal his bidding philosophy and told McDougal that he was being too aggressive. Wolf suggested that it is better to "give" a little (be cooperative). McDougal testified that Hurn was present at this conversation. Wolf contends that this evidence was far afield from the Sale and could only have been introduced impermissibly to show Wolf to be a "bad person."

Wolf's statement qualifies as an admission of a party, however. Fed. R. Evid. 801(d)(2). To the extent that it shows a practice of Wolf's of "cooperative" bidding constituting bad acts, it is admissible to show motive, intent, and absence of mistake. Fed. R. Evid. 404(b). The trial court determined that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, Fed. R. Evid. 403, and we find no abuse of discretion in that determination.

Jury Poll

Finally, Wolf claims that it was error for the court to wait until the jury had finished deliberations on all counts before conducting a poll. A trial court has substantial discretion to decide how a jury should be polled. *United States v. Lustig*, 555 F.2d 737, 746 (9th Cir. 1977), *cert. denied*, 434 U.S. 926, 1045 (1978). The contention, by Wolf, that the jurors would have forgotten feelings of coercion in the interim four day period of deliberation is without merit. Polling the jury before it finished the deliberations could easily have disrupted or

prejudiced the procedures. The trial court acted well within its discretion.

CONCLUSION

The indictments and the evidence against both Portac and Wolf were sufficient. The charges were properly tried together. No reversible errors occurred during trial. The convictions of Portac and Wolf are

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 87-3132

DC No. CR-87-37-JCC

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—vs—

PORTAC, INC.,
Defendant-Appellant.

CA No. 87-3138

DC No. CR-87-37-C

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—vs—

HOWARD L. WOLF,
Defendant-Appellant.

BEFORE: CANBY, Circuit Judge.

ORDER

[Filed May 29, 1990]

The motion of defendant Howard L. Wolf for a stay of mandate is GRANTED. The mandate of this court shall be stayed for thirty (30) days from the date of

filing of this order. If, within that period of time, the Clerk of this Court is notified by the Clerk of the Supreme Court of the United States that a petition for certiorari has been filed, the stay shall continue in effect until final disposition of the matter by the Supreme Court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. CR 87-37C

UNITED STATES OF AMERICA,
Plaintiff,

v.

HOWARD L. WOLF,
4022 Meridian East
Puyallup, WA 98371
SS# 488-38-8625,
Defendant.

JUDGMENT AND COMMITMENT

[Filed Dec. 22, 1987]

On the 20th day of November, 1987, came the attorney for the Government and the defendant appeared in person and with counsel, Nick Verwolf.

IT IS ADJUDGED that the defendant upon his plea of Not Guilty and a finding of GUILTY, has been convicted of the offense of Making False Declarations before the Grand Jury, in violation of Title 18, United States Code, Section 1623, as charged in Count IV of the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is committed to custody of the Attorney General or his authorized representaitve for imprisonment for a term of ONE (1) YEAR and ONE (1) DAY.

IT IS ORDERED that, pursuant to Title 18, United States Code, Section 3013, defendant shall pay the sum of FIFTY DOLLARS ($50) as a mandatory penalty assessment to be deposited in the Crime Victims Fund.

IT IS ORDERED that imposition of the sentence and assessment for the Crime Victims Fund be unconditionally stayed pending appeal of this matter.

Defendant will self-surrender to begin serving his sentence at the direction of the Probation Office.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ John C. Coughenour
United States District Judge

Presented by:

/s/ Richard B. Cohen
RICHARD B. COHEN
Attorney, Antitrust Division
U.S. Department of Justice
450 Golden Gate Ave., Box 36046
San Francisco, CA 94102

/s/ Gene S. Anderson
GENE S. ANDERSON
United States Attorney
Western District of Washington

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C87-37C

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ASTORIA PLYWOOD CORP., *et al.*,
Defendants.

VERBATIM TRANSCRIPT OF PROCEEDINGS, before the Honorable JOHN C. COUGHENOUR, United States District Judge, occurring on Friday, June 26, 1987, 9:30 a.m., at the United States Courthouse, Seattle, Washington.

* * * *

[6] Defendant Wolf has filed a motion to dismiss the Indictment which charges him with 21 instances of perjury before the grand jury investigating bid rigging in the Soleduck Ranger District. First, the Indictment does not by virture of paragraph 6 of Count IV, the so-called truth paragraph, charge the defendant in the disjunctive. As plaintiff indicates, the 21 statements that are underlined are alleged to have been falsely made in a matter material to the grand jury investigation. The truth paragraph merely articulates the nature of the alleged false statement. Similarly, each of the statements alleged to have been false is quoted in the Indictment. The defendant has therefore been clearly apprised of which statements he is charged with perjury, and there is consequently no double jeopardy problem.

Finally, the Indictment as a whole is not fundamentally ambiguous so as to require dismissal. The motion to dismiss is, therefore, denied. *See United States v. Lovechio*, 561 F.Supp. 221, 233 (M.D.Pa. 1983).

Defendant Wolf also seeks to strike portions of the Indictment in a separate motion. That motion is denied. A question is "fundamentally ambiguous" if it is not a phrase with a meaning about which men of ordinary intellect could agree, nor one which could be used with mutual understanding by a questioner and answered unless it were defined at the time it [7] were sought and offered as testimony. *United States v. Lighte*, 782 F.2d 367, 375 (2d Cir. 1986). A fundamentally ambiguous answer is insufficient to support a conviction for perjury as a matter of law. In deciding whether a question is sufficient, the Court must look to the context in which the question is asked and answered. *See United States v. Sainz*, 772 F.2d 559, 562 (9th Cir. 1985). Moreover, "The Indictment must set out the alleged perjurious statements and the objective truth in stark contrast to the alleged falsity of the statements." *United States v. Cowley*, 720 F.2d 1037, 1042 (9th Cir. 1983). I am satisfied that the Indictment meets these standards.

Defendant Wolf objects that a number of terms in the Indictment are fundamentally ambiguous. Words are not fundamentally ambiguous because they have different meanings in different situations. *See Lighte supra*, 782 F.2d 375. It is for the jury to determine whether the interrogator and the defendant lacked a mutual understanding of the meaning of the terms to which defendant objects.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 87-3132

DC No. CR-87-37-JCC

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-vs-

PORTAC, INC.,
Defendant-Appellant.

CA No. 87-3178

DC No. CR-87-37-C

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-vs-

HOWARD L. WOLF,
Defendant-Appellant.

BEFORE: POOLE, CANBY AND LEAVY, CIRCUIT JUDGES.

ORDER

[Filed May 15, 1990]

The panel has voted unanimously to deny petitions for rehearing and suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc and no judge of the court has requested a vote to rehear the matters en banc.

The petitions for rehearing are hereby denied and the suggestions for rehearing en banc are rejected.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CR87-37C

UNITED STATES OF AMERICA

v.

ASTORIA PLYWOOD CORPORATION;
HOH RIVER TIMBER, INC.;
PORTAC, INC.; and HOWARD L. WOLF,
Defendants.

INDICTMENT

The Grand Jury charges:

COUNT ONE

I

DEFENDANTS

1. Astoria Plywood Corporation, Hoh River Timber, Inc., and Portac, Inc. are hereby indicted and made defendants in this Count One.

2. Astoria Plywood Corporation is organized and exists under the laws of the State of Washington, with its principal place of business in Astoria, Oregon. During the period covered by this indictment, said defendant bid on and purchased timber sales located in the State of Washington, offered by the United States Forest Service, including timber sales located within the Soleduck Ranger District of the Olympic National Forest.

3. Hoh River Timber, Inc. is organized and exists under the laws of the State of Washington, with its principal place of business in Beaver, Washington. During the period covered by this indictment, said defendant bid on and purchased timber sales located in the State of Washington, offered by the United States Forest Service, including timber sales located within the Soleduck Ranger District of the Olympic National Forest.

4. Portac, Inc. is organized and exists under the laws of the State of Delaware, with its principal place of business in Tacoma, Washington. During the period covered by this indictment, Portac, Inc. purchased logs that had been removed from Olympic National Forest Soleduck Ranger District timber sales, from purchasers of such sales.

5. Whenever in this indictment reference is made to any act, deed or transaction of any corporation, such allegation shall be deemed to mean that such corporation engaged in such act, deed or transaction by or through its officers, directors, agents, employees or representatives while they were actively engaged in the management, direction, control or transaction of its business or affairs.

II

CO-CONSPIRATORS

6. Various corporations and individuals, not made defendants in this indictment, have participated as co-conspirators in the offense charged herein, and have performed acts and made statements in furtherance thereof.

III

TRADE AND COMMERCE

7. During the period covered by this indictment, the United States Forest Service was required by 16 U.S.C. § 472a and 36 C.F.R. Part 223 *et seq.*, to sell all sub-

stantial tracts of timber by competitive bidding, after advertising the timber at a minimum acceptable bid. The qualified bidder submitting the highest bid at or over the minimum acceptable price on a particular tract was awarded a contract to cut, remove and take ownership of the advertised timber.

8. The Soleduck Ranger District of the Olympic National Forest, located in northwestern Washington, sells approximately 84 million board feet of timber annually by means of numerous competitively bid sales of the right to cut, remove and take ownership of timber.

9. On February 18, 1985, the United States Forest Service, as required by law, advertised that an estimated 8,100,000 board feet of Soleduck Ranger District timber, known as the "Up and Adam" timber sale, would be sold on March 22, 1985 by competitive bidding.

10. Defendant Astoria Plywood Corporation, through its authorized agent, signed and submitted on March 22, 1985, one sealed qualifying bid for the Up and Adam timber sale.

11. Defendant Hoh River Timber, Inc., through its authorized agent, signed and submitted on March 22, 1985 one sealed qualifying bid for the Up and Adam timber sale.

12. On March 22, 1985, the United States Forest Service sold the Up and Adam timber sale by first opening and posting all sealed bids and then holding an oral auction among the qualifying bidders. No oral bids were received.

13. The Up and Adam timber sale was awarded to defendant Astoria Plywood Corporation because its sealed qualifying bid was the highest bid submitted.

14. Approximately 6.05 million board feet of Douglas fir and 2.05 million board feet of hemlock and other species were purchased by defendant Astoria Plywood

Corporation when it acquired the Up and Adam timber sale. Substantial quantities of the Douglas fir have been logged and hauled in a continuous and uninterrupted flow of interstate commerce from the State of Washington to defendant Astoria Plywood Corporation's mill located in Astoria, Oregon. Those logs were processed into veneer and plywood and resold, in a continuous and uninterrupted flow of interstate commerce, to purchasers located outside the State of Oregon. The hemlock and other species of logs were logged and sold, processed into timber products, and resold in a continuous and uninterrupted flow of interstate and foreign commerce to purchasers located outside the State of Washington.

15. The activities of the defendants and co-conspirators, as charged herein, were within the flow of, and substantially affected, interstate and foreign commerce.

IV

OFFENSE CHARGED

16. Beginning sometime on or before March 21, 1985, and continuing thereafter until at least March 1986, the exact dates being to this Grand Jury unknown, Astoria Plywood Corporation and Hoh River Timber, Inc., defendants herein, and others to the Grand Jury known and unknown, entered into and engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

17. Portac, Inc., defendant herein, willfully aided, abetted, counseled, commanded, induced or procured the formation of the aforesaid combination and conspiracy in violation of 15 U.S.C. § 1 and 18 U.S.C. § 2.

18. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were:

(a) to eliminate competitive bidding for the Up and Adam timber sale;

(b) to allocate the Up and Adam timber sale to defendant Astoria Plywood Corporation;

(c) to allocate logs from the Up and Adam timber sale among the defendants Astoria Plywood Corporation, Hoh River Timber, Inc., Portac, Inc. and a co-conspirator; and

(d) to reduce the price paid for public timber from the Up and Adam timber sale.

19. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which they combined and conspired to do, including:

(a) discussing which of the defendants should be the winning bidder on the Up and Adam timber sale;

(b) agreeing that defendant Astoria Plywood Corporation would be the winning bidder on the Up and Adam timber sale;

(c) agreeing not to bid orally against defendant Astoria Plywood Corporation in exchange for defendant Astoria Plywood Corporation's agreement to supply other persons with logs from the Up and Adam timber sale; and

(d) refraining from submitting oral bids during the oral auction phase of the Up and Adam timber sale.

V

EFFECTS

20. The aforesaid combination and conspiracy had the following effects, among others:

(a) competition for the Up and Adam timber sale was restrained and eliminated;

(b) the United States Forest Service was denied the benefits of free and open competition for the Up and Adam timber sale; and

(c) the United States Forest Service was denied the right to receive competitive bids for the Up and Adam timber sale.

VI

JURISDICTION AND VENUE

21. The aforesaid combination and conspiracy was carried out, in part, within the Western District of Washington within the five years next preceding the return of this indictment.

COUNT TWO

The Grand Jury further charges:

1. Astoria Plywood Corporation is hereby indicted and made a defendant in this Count Two.

2. Each and every allegation contained in paragraphs 2 through 19 of Count One of this indictment is here realleged with the same force and effect as though said paragraphs were set forth in full detail.

3. During the period covered by this indictment, the United States Forest Service required each person submitting a bid at a timber sale to sign a "Certificate of Independent Price Determination." This certificate provided, in pertinent part:

The bidder certifies:

a. By submission of this bid each bidder certifies, and in the case of a joint bid each party thereto certifies as to its own organization, that in connection with this procurement.

1) The prices in this bid have been arrived at independently, without consultation, communicatin [sic], or agreement, for the purpose of restricting competition as to any matter relating to such prices with any other bidder or with any competitor;

2) The prices which have been quoted in this bid have not been knowingly disclosed by the bidder and will not knowingly be disclosed by the bidder prior to opening of bid, directly or indirectly to any other bidder or to any competitor; and

3) No attempt has been made or will be made by the bidder to induce any other person or firm to submit or not to submit a bid for the purpose of restricting competition.

4. The United States Forest Service required each person submitting a qualifying bid on the Up and Adam timber sale to sign such a Certificate of Independent Price Determination, the pertinent terms of which are set forth in paragraph 3 of this Count.

5. On March 22, 1985, prior to the auction of the Up and Adam timber sale, defendant Astoria Plywood Corporation prepared, signed and submitted a qualifying bid for that sale which included a Certificate of Independent Price Determination containing the terms set forth in paragraph 3 of this Count. Said Certificate of Independent Price Determination was signed by an authorized agent of defendant Astoria Plywood Corporation.

6. On March 22, 1985, after defendant Astoria Plywood Corporation was declared the high bidder on the Up and Adam timber sale, defendant Astoria Plywood Corporation prepared, signed and submitted a confirmation of bid form which contained a Certificate of Independent Price Determination identical in form and content to the certificate it signed before the sale. This con-

firmation of bid form was prepared and signed by an authorized agent of defendant Astoria Plywood Corporation.

7. By submission of these two Certificates of Independent Price Determination, Astoria Plywood Corporation, defendant herein, willfully and knowingly made and caused to be made false, fictitious and fraudulent statements as to material matters within the jurisdiction of the United States Forest Service, an agency of the United States. In signing and submitting those Certificates of Independent Price Determination, defendant Astoria Plywood Corporation certified that it had made no attempt and would make no attempt to induce any other person or firm to submit or not to submit a bid for the purpose of restricting competition, when in truth and in fact, as the defendant Astoria Plywood Corporation knew, it had discussed not bidding on the Up and Adam timber sale with Hoh River Timber, Inc., it had induced or was about to induce Hoh River Timber, Inc. not to bid orally on the Up and Adam timber sale, and had entered or was about to enter into a collusive agreement with Hoh River Timber, Inc. for the purpose of restricting competition on that sale. Said certifications were in violation of Title 18, United States Code, Section 1001.

COUNT THREE

The Grand Jury further charges:

1. Hoh River Timber, Inc. is hereby indicted and made a defendant in this Count Three.

2. Each and every allegation contained in paragraphs 2 through 19 of Count One of this indictment and paragraphs 3 and 4 of Count Two of this indictment is here realleged with the same force and effect as though said paragraphs were set forth in full detail.

3. On March 22, 1985, Hoh River Timber, Inc. submitted with its bid on the United States Forest Service

Up and Adam timber sale a Certificate of Independent Price Determination, which contained the terms set forth in paragraph 3 of Count Two, signed by an authorized agent of Hoh River Timber, Inc.

4. By submission of that Certificate of Independent Price Determination, Hoh River Timber, Inc., defendant herein, willfully and knowingly made and caused to be made false, fictitious and fraudulent statements as to material matters within the jurisdiction of the United States Forest Service, an agency of the United States. In signing and submitting that Certificate of Independent Price Determination, Hoh River Timber, Inc., certified that it had made no attempt or would make no attempt to induce any other person or firm to submit or not to submit a bid for the purpose of restricting competition, when in truth and in fact, as the defendant Hoh River Timber, Inc. knew, Hoh River Timber, Inc. had attempted or was about to attempt to induce Astoria Plywood Corporation to refrain from bidding on the Up and Adam timber sale and had entered into or was about to enter into a collusive agreement for the purpose of restricting competition on that sale with Astoria Plywood Corporation. Said certification was in violation of Title 18, United States Code, Section 1001.

COUNT FOUR

The Grand Jury further charges:

1. Howard L. Wolf is hereby indicted and made a defendant in this Count Four. At the time he made the declarations charged in this Count, Howard L. Wolf was raw materials manager for Portac, Inc., a company engaged in the wood processing business in the State of Washington.

2. On June 12, 1986, and August 7, 1986, in the Western District of Washington, Howard L. Wolf testified under oath as a witness before a federal grand jury,

duly empanelled by the United States District Court for the Western District of Washington sitting in Seattle, Washington, and knowingly made false material declarations concerning a matter the grand jury was investigating, in violation of Title IV of the Organized Crime Control Act of 1970, 18 U.S.C. § 1623.

3. At the aforesaid times and place, the grand jury was conducting an investigation to determine, among other things, if purchasers of United States Forest Service timber, located in the State of Washington, had committed any violations of the Sherman Act, 15 U.S.C. § 1 *et seq.*, or related offenses.

4. It was material to this grand jury investigation to determine whether Howard L. Wolf had participated in, or had knowledge or information about, communications or agreements between or among representatives of companies bidding on United States Forest Service timber sales about such sales. It was also material to this grand jury investigation to determine whether Howard L. Wolf had discussed the investigation with Donald Gardner or had attempted to influence Gardner not to cooperate with the investigation.

5. At the aforesaid times and place, Howard L. Wolf, while under oath, knowingly declared falsely before said federal grand jury with respect to the material maters set out in paragraph 4 of this Count as follows:

[Declarations charged as false are [italicized].]

Q. Do you know whether or not Mr. Hurn had any contact with a representative of Astoria Plywood prior to the Up and At 'Em [sic] timber sale?

A. *No.*

Q. Do you have any reason to believe that he did?

A. *No.*

(June 12, 1986 Tr. P. 68 LL. 10-15)

* * * *

Q. Let's go back over it. The question was, Mr. Wolf, did Mr. Hurn tell you that he had had a discussion with Mr. Axon prior to those two sales being auctioned?

A. *No.*

Q. Did he give you any reason to believe that there had been a discussion between those two gentlemen prior to the auction of those two timber sales which, by the way, were sold on the same day?

A. *Not that I recall.*

(August 7, 1986 Tr. P. 75 LL. 5-13)

* * * *

Q. To your knowledge did Dean Hurn and Norm Axon discuss Lovelace and Up and At 'Em [sic] prior to the time they were let?

A. *I have no knowledge of their discussions. I was not involved, okay?*

Q. Did Dean Hurn tell you he had talked to Norm Axon?

A. *No.*

Q. Did Norm Axon tell you he had talked to Dean Hurn?

A. No.

(August 7, 1986, Tr. P. 79 LL. 4-11)

* * * *

Q. You know what bid rigging is, do you not?

A. Yes.

Q. What is bid rigging?

A. Where bidders conspire to predetermine what price a job would be or would end up with the award of a job or of a timber sale or a purchase.

Q. And what is a courtesy bid?

A. That I don't know.

Q. Have you ever heard that expression?

A. Not really.

Q. Have you ever participated in any way, shape, or form in rigging, bid rigging on a Forest Service timber sale?

A. *No.*

Q. How about on a State timber sale?
A. No.
Q. Have you ever heard of it happening?
A. Yes.
Q. When is the last time you heard about it?
A. Several years ago down in the Detroit, Oregon, area the newspapers did an account of exclusive rigging and bid rigging, and years before that in the Mapleton area there was some investigation, in Oregon.
Q. What about in the Soleduck?
A. *As far as I know, no bid rigging.*
Q. Has anybody ever told you that a sale was rigged?
A. *No.*
Q. How about in a bar?
A. I don't go to bars very often.
Q. How about the Forks Cafe?
A. No.
Q. Has Dean Hurn ever told you that he rigged a bid?
A. *No.*

(June 12, 1986, Tr. P. 60 LL. 5-25; P. 61 LL. 1-11)

* * * *

Q. Have you indicated to anybody in any fashion that they should not cooperate in this investigation?
A. *No.*

(August 7, 1986, Tr. P. 39 LL. 6-8)

* * * *

Q. Have you ever tried to discourage anyone from cooperating with the government in the investigation?
A. *No.*
Q. Categorically you can deny that?
A. *Yes.*

(August 7, 1986, Tr. P. 41 LL. 3-7)

* * * *

Q. Have you discussed this with Ray Allen, this investigation?
A. No.

Q. Ben Levein [sic]?

A. Not that I recall.

Q. Don Gardner?

A. *No.*

Q. Have you discussed anything about this investigation with Don Gardner?

A. *No, not that I recall.*

Q. We're not talking ancient history, Mr. Wolf, we're talking the last year.

A. *That's what I say, I don't recall ever discussing.*

Q. When is the last time you talked to Don Gardner?

A. A week ago.

Q. How often do you see Mr. Gardner?

A. Every three months or so.

Q. So, in the last year you have seen him perhaps four or five times?

A. Um-hmm.

Q. In those four or five times did you discuss the investigation with him?

A. *No, just—it may have come up, I don't recall. If it did, it was—he might have brought it up. I didn't.*

(August 7, 1986, Tr. P. 42 LL. 13-25; P. 43 LL. 1-11)

* * * *

Q. Have you attempted to influence in any manner whether Don Gardner would cooperate with this investigation?

A. *No.*

Q. For the record, sir, you understand the question I'm asking?

A. Well, would you repeat it then.

Q. Have you attempted in any way to influence whether or not, in this case, Don Gardner would cooperate with this investigation?

A. *No, I didn't try to influence him at all.*

Q. Okay.

A. *As I recall, we probably didn't even discuss the investigation.*

Q. And you'll give the same answer for Ben Levein (sic)?

A. Yes.

Q. Just so the record is perfectly clear, would you rephrase in your own words the question I'm asking you.

A. *Okay. I have not tried to influence anybody not to cooperate with the U.S.—well, this investigation.*

Q. Or with the people conducting this investigation?

A. Or with the people conducting it.

Q. And that's your testimony?

A. That's my testimony.

(August 7, 1986, Tr. P. 43 LL. 19-25; P. 44 LL. 1-16)

6. The aforesaid declarations of Howard L. Wolf as he then and there knew, were false in that: (1) he had knowledge or information about communications, agreements, or bid rigging between and among representatives of bidders on United States Forest Service timber sales, including Dean Hurn of Hoh River Timber, Inc. and Norman Axon of Astoria Plywood Corporation, pertaining to the March 22, 1985 United States Forest Service Up and Adam timber sale, or reason to believe that such communications or agreements took place; and (2) he had discussed the investigation with Donald Gardner and had attempted to influence Gardner not to cooperate with the investigation.

7. The aforesaid declarations of Howard L. Wolf were made in the Western District of Washington, within the period of any applicable statute of limitations, in violation of Title IV of the Organized Crime Control Act of 1970, 18 U.S.C. § 1623.

A TRUE BILL Dated: February 23, 1987

/s/ Gail Thurman
Foreperson

/s/ Charles F. Rule
CHARLES F. RULE
Acting Assistant
Attorney General

/s/ Richard B. Cohen
RICHARD B. COHEN

/s/ Joseph H. Widmar
JOSEPH H. WIDMAR

/s/ Paul R. Taylor
PAUL R. TAYLOR

/s/ Gary R. Spratling
GARY R. SPRATLING
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Antitrust Division
U.S. Department of
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/s/ John F. Cove, Jr.
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/s/ Gene S. Anderson,
by KPP
GENE S. ANDERSON
United States Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. CR87-37C

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PORTAC, INC. and HOWARD L. WOLF,
Defendants.

JURY VERDICT

[Filed July 21, 1987]

WE, THE JURY, find as follows:

COUNT I

As to Count I, we find the defendant, Portac, Inc.,

Guilty ☐

Not Guilty ☐

COUNT IV

As to Count IV, we find the defendant, Howard L. Wolf,

Guilty ☒

Not Guilty ☐

If the jury finds defendant Howard L. Wolf guilty, indicate which of the following statements the members of the jury unanimously agree was a false declaration in violation of Title 18, United States Code § 1623:

1. ☐ Q. Do you know whether or not Mr. Hurn had any contact with a representative of Astoria Plywood prior to the Up and At 'Em [sic] timber sale?

   A. *No.*

2. ☒ Q. Do you have any reason to believe that he did?

   A. *No.*

3. ☐ Q. Let's go back over it. The question was, Mr. Wolf, did Mr. Hurn tell you that he had had a discussion with Mr. Axon prior to those two sales being auctioned?

   A. *No.*

4. ☐ Q. Did he give you any reason to believe that there had been a discussion between those two gentlemen prior to the auction of those two timber sales which, by the way, were sold on the same day?

   A. *Not that I recall.*

5. ☐ Q. To your knowledge did Dean Hurn and Norm Axon discuss Lovelace and Up and At 'Em [sic] prior to the time they were let?

   A. *I have no knowledge of their discussions. I was not involved, okay?*

6. ☐ Q. Did Dean Hurn tell you he had talked to Norm Axon?

   A. *No.*

7. ☐ Q. Have you ever participated in any way, shape, or form in rigging, bid rigging on a Forest Service timber sale?

   A. *No.*

8. ☐ Q. What about in the Soleduck?

A. *As far as I know, no bid rigging.*

9. ☒ Q. Has anybody ever told you that a sale was rigged?

A. *No.*

10. ☐ Q. Has Dean Hurn ever told you that he rigged a bid?

A. *No.*

DATED this 17th day of July, 1987.

/s/ Robert Widdice
Foreperson of the Jury

(2)

No. 90-3

FILED
JUL 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

HOWARD L. WOLF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
JAMES F. RILL
Assistant Attorney General
MICHAEL BOUDIN
Deputy Assistant Attorney General
ROBERT B. NICHOLSON
MARION L. JETTON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the perjury count in the indictment sufficiently apprised petitioner of the illegal acts with which he was charged.

2. Whether petitioner's statements before the grand jury were literally true and therefore could not be the predicate for a perjury conviction.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-3

HOWARD L. WOLF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 869 F.2d 1288.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1989. A petition for rehearing was denied on May 15, 1990. Pet. App. 23a. The petition for a writ of certiorari was filed on June 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the Western District of Washington, petitioner was convicted on one count of making false

declarations before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to a term of imprisonment of a year and a day.[1] The court of appeals affirmed. Pet. App. 1a-16a.

1. On February 18, 1985, the United States Forest Service advertised that an estimated 8,100,000 board feet of timber in northwestern Washington would be auctioned by competitive bidding. The sale was known as the "Up and Adam" timber sale and was scheduled for March 22, 1985. The Forest Service set $515,728 as a minimum acceptable bid, and it provided that, following the opening of the sealed bids, the bidders could make oral bids for the timber. Pet. App. 2a-3a, 26a.

Although Portac, Inc., petitioner's employer, was not permitted to bid on the timber because it was affiliated with a log exporter (Pet. App. 4a), the company was interested in purchasing logs from the sale for its sawmill. Toward that end, petitioner had conversations prior to the sale with Dean Hurn of Hoh River Timber, Inc. (Hoh), and also with a buyer from Astoria Plywood Corporation (Astoria), to determine whether those companies intended to make a bid at the auction. Tr. 133-135, 174, 304-305. Then, on the morning of the sale, petitioner spoke with Hurn, who told him that he was going to bid on the sale for Hoh, and that Seattle-Snohomish Mill Co. (Seattle-Snohomish) was also going to the sale because it wanted some of the logs. Tr. 136, 139-140. Petitioner and Hurn also discussed Astoria's interest in the sale, and petitioner reiterated Portac's interest in obtaining some of the wood. According to Hurn's testimony, petitioner offered his "blessings" on Hurn's plan

[1] Portac, Inc., petitioner's employer, was convicted as well, on charges of aiding and abetting the formation of a conspiracy in unreasonable restraint of trade, in violation of 15 U.S.C. 1. Portac was required to pay a $200,000 fine.

to try to make "a deal" with Astoria on the sale, and if no agreement could be reached, to make a bid on Hoh's behalf. Pet. App. 4a, 7a; Tr. 138-140, 145, 173-174. Petitioner also facilitated Hurn's meeting with Astoria by calling Astoria's timber manager, Norm Axon, and telling him to meet with Hurn the morning before the sale. Pet. App. 13a; Tr. 243-244, 268-269.

On the morning of the sale, Axon and Hurn met with Neill Bowman of Seattle-Snohomish in the parking lot in front of the Forest Service office. Bowman told Hurn that he wanted logs from the sale and that if he did not reach an agreement to provide logs, he would place a bid for the timber. The three buyers then reached an agreement, under which Astoria would buy the timber, Hoh would receive the hemlock from the sale, and the fir would be evenly divided among Astoria, Portac, and Seattle-Snohomish. Pet. App. 4a.

The bidding then proceeded in accordance with the agreement. Hoh and Seattle-Snohomish bid $515,728, the minimum acceptable amount, and Astoria bid $20.50 above the minimum. Although oral bids were allowed following the unsealing of the written bids, none of the three companies made an oral bid. The evidence at trial established that Hoh had originally been prepared to bid up to $791,000. Pet. App. 3a.

The same day, Hurn spoke to Portac's president, C.C. Pittman, told him what had been "agreed to," and advised him that, as a result of the agreement, Portac would be receiving some of the wood. Pet. App. 4a; Tr. 150-151. Hurn also told petitioner that he had talked to Axon about the sale and that Portac "would be able to buy logs off of it." Tr. 373-374.[2] Ultimately, however, Hoh and Portac

[2] Calls billed to petitioner's credit card were made to both Axon's and Bowman's residences within minutes of each other on the evening after the sale. Tr. 292.

did not receive any logs from the sale. Pet. App. 4a. After a grand jury began to investigate the timber sale, Axon told Hurn that he was not going to carry out the agreement. *Id.* at 4a-5a. Hurn thereafter conveyed that information to petitioner. *Id.* at 14a.

2. On June 12 and August 7, 1986, petitioner testified under oath before a federal grand jury that was investigating bid-rigging on Forest Service timber in Washington State. Although he knew of the buyers' agreement involving the Up and Adam timber sale, petitioner gave the following answers to questions asked by the prosecutor (Pet. App. 5a):

> Q. Do you know whether or not Mr. Hurn had any contact with a representative of Astoria Plywood prior to the Up and At 'Em [sic] timber sale?
>
> A. No.
>
> Q. Do you have any reason to believe that he did?
>
> A. No.
>
> * * * *
>
> Q. Has anybody ever told you that a sale was rigged?
>
> A. No.

The indictment charged that each of those answers was false. The jury found that the last two answers violated 18 U.S.C. 1623. Pet. App. 5a.

3. The court of appeals affirmed petitioner's conviction. Pet. App. 1a-16a. The court rejected petitioner's contention that the indictment was insufficiently specific because it lacked a paragraph detailing the truth of the matters about which petitioner had allegedly given false testimony. The court explained that petitioner had responded with a categorical "no" to the questions posed, and that the indictment had clearly alleged that those answers were false. *Id.* at 12a. The court noted that in light of the questions and answers, "the opposite truth is apparent without the need

for a particular averment." *Ibid.* The court also rejected petitioner's claim that the question about what he had "reason to believe" was too ambiguous to support a conviction. *Id.* at 13a. It noted that the meaning of that question must be considered in context, and it explained that "the issue is whether persons of ordinary intelligence could agree on the meaning of the language or use it with mutual understanding." *Ibid.* The court concluded that the question "was quite understandable." *Ibid.* Finally, the court held that the evidence was sufficient to sustain petitioner's conviction. *Id.* at 13a-14a.

ARGUMENT

1. Petitioner was convicted on the basis of his answers to two questions before the grand jury, the first of which asked whether he had "any reason to believe" that Hurn had met with Astoria prior to the timber sale. Petitioner contends (Pet. 8-18) that that question was ambiguous and insufficiently specific, and that his conviction should therefore be reversed. That claim is meritless.

In the first place, the jury found that petitioner had given false testimony in response to a second question as well. See Pet. App. 41a.[3] Petitioner does not, however, challenge the clarity of that question. Because, as the court of appeals observed (*id.* at 14a), petitioner's conviction can be sustained on the basis of his false answer to the second question alone, there is no reason to review his challenge to the first question.

In any event, the first question was sufficiently specific and unambiguous. As the court of appeals explained (Pet. App. 12a-13a), the question was clear and unambiguous, particularly in light of the immediately preceding question,

[3] The question was: "Has anybody ever told you that a sale was rigged?" Petitioner's answer was: "No." Pet. App. 5a.

which asked whether petitioner knew of any contact between Hurn and Astoria before the timber sale. To each of those questions, petitioner responded with a categorical "no." Thus, when the indictment alleged that this statement was false, it clearly informed him that the government would seek to show that petitioner had reason to believe that Hurn had contacted Astoria prior to the Up and Adam sale. Moreover, the indictment went on to allege, in a "truth" paragraph, precisely why petitioner knew that the statements he had made to the grand jury were false.[4] Because the indictment contained such a "truth" paragraph, there is no merit to petitioner's request (Pet. 12-15) that this Court resolve an asserted conflict concerning whether such a "truth" paragraph is required.[5]

2. Petitioner contends (Pet. 18-19) that his negative answers were literally true and therefore could not sustain

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[4] Paragraph 6 of the indictment stated (Pet. App. 37a):

> The aforesaid declarations of Howard L. Wolf as he then and there knew, were false in that * * * he had knowledge or information about communications, agreements, or bid rigging between and among representatives of bidders on United States Forest Service timber sales, including Dean Hurn of Hoh River Timber, Inc. and Norman Axon of Astoria Plywood Corporation, pertaining to the March 22, 1985 United States Forest Service Up and Adam timber sale, or reason to believe that such communications or agreements took place * * *.

[5] Even if the indictment had omitted the truth paragraph, however, there would be no reason to address the circuit conflict asserted by petitioner. The cases that petitioner cites from the Third and Sixth Circuits (see Pet. 12-15) stand merely for the proposition that a truth paragraph is necessary where the questions and answers are insufficiently clear. See, *e.g.*, *United States* v. *Tonelli*, 577 F.2d 194, 196-200 (3d Cir. 1978); *United States* v. *Eddy*, 737 F.2d 564, 570-572 (6th Cir. 1984). See also *United States* v. *Qaoud*, 777 F.2d 1105, 1114 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986). For the reasons noted above, the questions put to petitioner before the grand jury were entirely clear, and his answers were unambiguously false.

a perjury conviction. At bottom, that claim is simply an attack on the sufficiency of the evidence. As the court of appeals explained (Pet. App. 13a-14a), the evidence readily supported the jury's conclusion that someone had "told" petitioner that the sale was rigged, and that petitioner had "reason to believe" that Hurn met with Astoria before the sale. In particular, the evidence showed that petitioner had advised Axon, Astoria's timber manager, to meet with Hurn before the sale, and that Hurn had told petitioner of his plan to reach a pre-bidding agreement with Astoria, if possible. The evidence also showed that following the sale, Hurn had informed petitioner of Axon's decision to terminate the agreement because of the pending grand jury investigation. *Ibid.* The court of appeals' factbound conclusion that that evidence was sufficient warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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